Supreme Court, U.S.
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No. 99-1449

IN THE

Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *ET AL.*,
Petitioners,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the Sherman Act applies to a state statute limiting the number of off-premises retail liquor licenses that may be held by any one person in the Commonwealth of Massachusetts, where the statute is the unilateral act of a state and does not grant to any private person any pricing or any other discretion to act anticompetitively.

Parties.

The parties in this case are Massachusetts Food Association; Roche Bros. Supermarkets, Inc.; The Stop & Shop Supermarket Company; Packaging Center, Inc.; BJ's Wholesale Club, Inc.; Mormax Corporation; The Edwin R. Sage Company, Inc.; Trader Joe's Co.; and Trader Joe's East, Inc., petitioners; and the members of the Massachusetts Alcoholic Beverages Control Commission, in their official capacities, respondents.

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondents, members of the Massachusetts Alcoholic Beverages Control Commission, in their official capacities ("respondents"), submit this brief in opposition to the petition for writ of certiorari (the "petition").

Decisions Below

The opinion of the United States Court of Appeals for the First Circuit, reproduced at pages 1a - 13a of Appendix A to the petition, is reported at 197 F.3d 560 (1st Cir. 1999). The earlier decision of the United States District Court for the District of Massachusetts is reported at 184 F.R.D. 217 (D. Mass. 1999), and it is included in Appendix B to the petition at pages 14a - 38a.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered December 2, 1999. See Appendix A to Pet. at 2a. The petition was filed and docketed on March 1, 2000; respondents received formal service of the petition on March 6, 2000. The petitioners invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The federal constitutional and statutory provisions at issue are the Supremacy Clause of the United States Constitution, and section 1 of the Sherman Act, 15 U.S.C. § 1.

The Supremacy Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl. 2.

Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal.

15 U.S.C. § 1.

As to the relevant Massachusetts statute, the Commonwealth sets forth portions of the text of Mass. Gen. Laws c. 138, § 15 (1995 and Supp. 1999), as follows:

> The local licensing authorities in any city or town which votes to authorize the granting of licenses for the sale of all alcoholic beverages, and such authorities in any city or town which votes to authorize the granting of licenses for the sale of wines and malt beverages only, may grant licenses for the sale at retail of such alcoholic beverages or wines and malt beverages, as the case may be, not to be drunk on the premises, to applicants therefor who are citizens and residents of the commonwealth, or partnerships composed solely of such citizens and residents or to corporations organized under the laws of the commonwealth and whereof all directors shall be citizens of the United States and a majority residents of the commonwealth. **No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person or any subsidiary whatsoever, shall be granted, in the aggregate,**

> more than three such licenses in the commonwealth, or be granted more than one such license in a town or two in a city. No such license shall be granted except to an applicant approved by the commission.

(Emphasis added).

Statement of the Case

I. PROCEEDINGS BELOW.

Petitioners filed a complaint in the United States District Court for the District of Massachusetts challenging that portion of Mass. G.L. c. 138, § 15, which provides that no person may hold more than three licenses to sell alcoholic beverages at retail (off-premises) in the Commonwealth, on the ground that this portion of the statute violates section 1 of the Sherman Act.[1] Petitioners in effect claimed that the statutory limitation constitutes a "hybrid" restraint under applicable Supreme Court precedent, and that the test for state action immunity applicable to hybrid restraints had not been met.

Petitioners appealed from the District Court's decision granting respondents' motion to dismiss the amended complaint. The United States Court of Appeals for the First Circuit affirmed the District Court's decision. The Court of Appeals held that the three-license limit was a unilateral restraint not

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[1] Section 1 of the Sherman Act provides in relevant part, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." 15 U.S.C. § 1.

subject to the Sherman Act's prohibitions. Appendix A to Pet. at 9a, citing Fisher v. City of Berkeley, 475 U.S. 260, 266 (1986). Petitioners filed a petition for writ of certiorari on or about March 1, 2000.

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." Id. The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. In re Woods, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

For the reasons set forth below, the petition does not satisfy the traditional criteria which guide the Court's discretionary review, and it should be denied.

I. THE COURT'S DECISION CORRECTLY APPLIED RELEVANT SUPREME COURT PRECEDENT; THERE IS NO SUBSTANTIAL CONFLICT OF DECISIONS WITHIN THE CIRCUIT COURTS THAT WOULD WARRANT CERTIORARI.

A. *The Sherman Act Does Not Apply to a Unilateral Restraint Imposed by a State Legislature as an Act of Government.*

As the Supreme Court has observed, "when a state legislature adopts legislation, its actions constitute those of the State, . . . and ipso facto are exempt from the operation of the antitrust laws." Hoover v. Ronwin, 466 U.S. 558, 567-68 (1984). In Hoover, the Court stated that the "reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anti-competitive fashion, but that the State itself has chosen to act." Id. at 574. In Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1076 (1st Cir. 1993), the First Circuit elaborated on the Supreme Court's statement of the law:

> A half century ago, the Supreme Court determined, in Parker v. Brown, 317 U.S. 341, . . . (1943), that Congress had not intended the federal antitrust laws to apply to trade restraints or monopolies imposed by state governments. Although the antitrust laws aim at competitive markets, the Court in Parker recognized that governments often restrict competition for public purposes. The actions of state governments, no less than those of the federal government itself,

were deemed not to fall within the constraints of the antitrust laws.

In this case, the challenged "anticompetitive" conduct is unilateral action by the State Legislature to prohibit any person or entity from holding more than three retail off-premises liquor licenses.[2] This is a quintessential unilateral restraint in the form of pure government regulation in an area at the core of the State's police powers. Fisher v. City of Berkeley, 475 U.S. 260, 269-270 (1986). This activity, even if "anticompetitive" in some sense, is nonetheless by definition authorized by the state. Therefore, no "violation" of the antitrust laws exists because the Sherman Act simply does not apply. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).

Petitioners' argument distorts the Court's analysis in Fisher. For purposes of analyzing a restraint imposed by government, rather than by private agreement, the issue is whether, and to what extent, the statute grants a "'degree of private regulatory power'" to private market participants, in this case, retailers of alcoholic beverages. Fisher, 475 U.S. at 268, quoting Rice v. Norman Williams Co., 458 U.S. 654, 666 n.1 (1982) (Stevens,

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[2] Section 15, in its entirety, sets forth a complex and detailed statutory scheme for granting licenses for the sale of alcoholic beverages at retail for off-premises consumption. It is part of the Commonwealth's comprehensive regulation of the alcoholic beverages industry.

J. concurring). If the statute does so, then it constitutes a "hybrid" restraint. See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (resale price maintenance); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (same). Here, the statute confers no discretion whatever on retailers. Indeed, it is the statute itself which embodies the "anticompetitive" conduct plaintiffs challenge. Section 15 simply strips retailers of a power that they would otherwise have had in a completely free market. Where a statute does not confer on market participants discretion that they would not otherwise have had, the so-called "hybrid" restraint analysis of Fisher does not apply. See Fisher, 475 U.S. at 267 ("[a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.") See also 1 P. Areeda and H. Hovenkamp, Antitrust Law, ¶ 217b3, at 314 (rev. ed. 1997). As the First Circuit observed, "[i]n this case, the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores -- as it does for many businesses or professions -- and limits the number of licenses to three per owner." Appendix A to Pet. at 6a.

By contrast, under Parker and its progeny, when a state

imposes a hybrid restraint[3] -- as opposed to the unilateral restraint at issue here -- and a private actor engages in anticompetitive conduct pursuant to such a restraint, he is immune from the antitrust laws (1) if he engages in the activity pursuant to a clearly articulated and affirmatively expressed state policy and (2) if the anticompetitive activity is actively supervised by the state. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). However, neither of these tests apply to a state that imposes a restraint as an act of government, especially where the restraint confers no authority on private actors to act anticompetitively. See Fisher, 475 U.S. at 267.

As the First Circuit implicitly recognized, Appendix A to Pet. at 6a, the fact that the statute could conceivably have an anticompetitive effect is irrelevant. As this Court stated in upholding a Maryland statute that prohibited producers or refiners of petroleum products from operating retail service stations within Maryland and required that all temporary price reductions be extended uniformly to all service stations supplied:

> [Appellants' argument] is merely another way of

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[3] A hybrid restraint, as defined by this Court in Fisher, is one in which governmental "nonmarket mechanisms merely enforce private marketing decisions. . . . Where private actors are thus granted a degree of private regulatory power, . . . the regulatory scheme may be attacked under § 1." Fisher, 475 U.S. at 268 (1980) (citing Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)).

> stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act -- our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.

Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (citations omitted).

Petitioners' extensive reliance on Rice is misplaced. Rice must be read in the context of the cases of Fisher, Duffy[4], and Midcal. These cases, read together, demonstrate that where, as here, a state imposes a restraint as an act of government and where the restraint does not provide the individual or entity regulated with "a degree of private regulatory power," Fisher, 475 U.S. at 286, the Sherman Act simply does not apply.

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[4] In 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), the Supreme Court invalidated a state regulatory scheme that effectively allowed one level of the market (wholesalers) to dictate the prices at which the next lower tier of the market (retailers) sold alcohol.

B. *No Real and Embarrassing Conflict Exists Among the Circuits Which Have Decided this Issue.*

The petition asserts that there is a conflict between the decisions of the First and Ninth Circuits. Pet. at 12-14.

The First Circuit's decision that a unilateral restraint imposed by a state is not subject to the Sherman Act is not inconsistent with the Ninth Circuit's decision in Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987), cert. denied, 484 U.S. 1061 (1988), and is consistent with other Ninth Circuit precedent. In Miller, the Ninth Circuit concluded that the Oregon pricing scheme for the sale of beer and wine, which involved price-setting by private parties, constituted a hybrid restraint. 813 F.2d at 1350-51. Once that conclusion was reached, the Court applied a hybrid restraint analysis.[5] By

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[5] One may disagree with the determination by the Ninth Circuit that the regulatory scheme in that case constituted a hybrid restraint, but that does not militate in favor of granting the petition. Cf. U.S. Supreme Court Rule 10 (certiorari will not be granted where the error in the decision results from "misapplication of a properly stated rule of law."). Indeed, it can easily be argued that Miller is not a correct application of the law. Miller's holding was based upon a faulty analysis of the reasoning of two cases, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and Midcal. In Schwegmann, the Court analyzed the nature and effect of a Louisiana statute which not only permitted contracts for resale price maintenance between distributors and retailers, but also enforced those contracts against nonsigners of the contracts at the retail level. Schwegmann, 341 U.S. at 387. The Court noted that such contracts, even absent enforcement against nonsigners, would constitute price fixing and

contrast, the First Circuit in this case decided that the statute's three-license limitation was a unilateral, not a hybrid, restraint. Therefore, the hybrid restraint analysis of Miller never came into play.

Other cases decided by the Ninth Circuit demonstrate that there is no fundamental conflict between the First and Ninth Circuits in this regard. For example, in Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987) (exclusive franchise contract between SIDA and the Hawaii Department of Transportation), the Ninth Circuit held that "state executives and executive agencies, like the state supreme court, are entitled to Parker immunity for actions taken" within their lawful authority, regardless of whether the particular actions at issue or their anticompetitive effects were

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therefore a per se violation of the Sherman Act. Id. at 386. The Court recognized that the statute at issue extended beyond what was both permitted and specifically contemplated by the Miller-Tydings Act--that is, contracts prescribing minimum prices for the resale of specified commodities, so long as such contracts were permitted under local law--to require enforcement of such contracts against nonsigners. The effect would be to fix prices at the retail level by the entry of one distributor into one contract with one retailer, thereby compelling horizontal price fixing by all retailers. Schwegmann, 341 U.S. at 389-390. The other case relied on by the Miller court, Midcal, similarly turned on the requirement of resale price maintenance. Miller sought to apply Midcal and Schwegmann to the regulations there at issue, holding that the regulations "compel[led] activity that would otherwise be a per se violation of the Sherman Act." Id. at 1349. However, the fact that the Miller court applied an arguably faulty label to a regulatory scheme does not create the type of conflict among the circuits that would justify the granting the petition.

contemplated by the legislature. 810 F.2d at 876. "When the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign." Id. Similarly, in Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990), while applying the clear articulation test to an entity determined not to merit treatment as a sovereign, the Ninth Circuit nonetheless acknowledged that "the Supreme Court has construed the Sherman Act not to apply to anti-competitive acts undertaken by a state in its sovereign capacity." Id. at 1456. See also Traweek v. City and County of San Francisco, 920 F.2d 589, 591 (9th Cir. 1990) (anticompetitive actions of a state are immune from the antitrust laws; state action immunity extends to municipalities where municipality demonstrates that the state policy authorizing the challenged action has been clearly articulated); Kern-Tulare Water District v. City of Bakersfield, 828 F.2d 514, 518 (9th Cir. 1987) (no federal antitrust "liability" arises for an anti-competitive act by a state acting as sovereign; state may sanction anti-competitive municipal activities where state policy authorizing challenged restraint is clearly articulated and affirmatively expressed), cert. denied, 486 U.S. 1015 (1988).

To the extent that there is any perceived conflict among these decisions, this does not support plenary review at this time. See Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955) (conflict in lower courts will not justify review unless it is "real and embarrassing") (emphasis added) (citation omitted).

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT.

Because the statute is not subject to the Sherman Act, this case presents no significant issue of federal law requiring resolution by the Court. The MFA decision is entirely consistent with prior precedent of this Court. Fisher, 475 U.S. at 267. "The rationale of Parker was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 375 (1991).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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